

No. 80804-0

SUPREME COURT,
OF THE STATE OF WASHINGTON

Nick ALMQUIST, ET AL.

Appellants,

v.

CITY OF REDMOND, a political subdivision of the state
of Washington,

Respondent.

CLERK

BY RONALD R. CARPENTER

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FILED
SUPREME COURT
STATE OF WASHINGTON

RESPONDENT'S RESPONSE TO PETITIONER'S
SUPPLEMENTAL BRIEFING

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ORIGINAL

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A. PURPOSE

The purpose of this supplemental brief is to respond to the argument of the Petitioners/Appellants (hereinafter referenced as the "Employees") in their recently filed PETITIONERS' SUPPLEMENTAL BRIEF.

B. SUMMARY OF ARGUMENT

This court's recent decision in *Champagne v. Thurston County*, 163 Wn.2d 69, 17 P.3d 936 (2008), does not benefit the Employee's claims. *Champagne*, in fact, strikes a fatal blow to any argument the Employees had under the MWA and WPA. In addition, this Court reaffirmed that in order for a delayed payment to violate the WRA, RCW 49.52, the delayed payment must be both *willful* and the result of *an intent to deprive* the employee(s) of wages due. Here the record demonstrates no evidence of willful conduct or an intent to deprive the employees of the retro payments in question. To the contrary, the record demonstrates that the delayed payment was the result of a bona fide dispute. CP 383-563.

Finally, the Court of Appeals decision is based upon the clear statutory language of RCW 41.56.450 and RCW 41.56.480, as well as the actual language of the interest arbitration decision and award. The arbitration decision and award required the parties to include specified wage rate increases for the years 2002 - 2004 in their new collective bargaining agreement. Exhibit 2 at 35 (See Appendix). There is no language in the decision and award "ordering" payment of retroactive

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wage payments to employees. Unlike a grievance arbitration involving a dispute over contractual obligations between the parties, an interest arbitration is used to determine the terms of the contract between the parties that they are unable to negotiate agreement upon at the bargaining table. *IAFF, Local 46 v. City of Everett*, 146 Wn.2d 29, 46, 42 P.3d 1265 (2002).

Therefore, the decision of the Court of Appeals should be affirmed on the basis that the interest arbitration award did not set a date for payment of retro wage payments and/or on the additional basis that the City's delayed payment did not violate the MWA, the WPA, or the WRA.

C. ARGUMENT

1. As a result of *Champagne v. Thurston County*, supra, the Employees have no viable claims under RCW 49.46 (MWA) and RCW 49.48 (WPA)

The Employees recognize in footnote 1 to their Supplemental Brief¹ that this court recently decided in *Champagne* that “delayed payment” does not provide a cause of action under the MWA, RCW 49.46, where all wages have been paid. It is undisputed that the Employees received the retroactive wages due them in the May 25, 2004 City payroll. Stipulated Finding of Fact number 37 at CP 386; and Trial Court Finding of Fact 1.8 at CP 594.

¹ See Petitioner's Supplemental Brief - 5.
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Therefore, regardless whether or not this court agrees with the decision of the Court of Appeals that the interest arbitration award did not fix a date for payment of retroactive wage adjustments, the summary judgment dismissal of the MWA claim by the superior court must be affirmed.

In addition, this court in *Champagne* reaffirmed its prior decision in *Pope v. University of Washington*, 121 Wn.2d 479, 852 P.2d 1055 (1993), by determining that RCW 49.48.010 does not apply to nontermination cases. Like the employees in *Pope* and in *Champagne*, the Employees here are not claiming that their employer made improper deductions at the time of termination. The Employees base their wage act claims on the passing of five pay periods between the date of the interest arbitration award and the May 25, 2004 payroll. See Trial Court Finding of Fact 1.9 at CP 594. The Employees WPA claim is beyond the scope of RCW 49.48.010.

Therefore, the dismissal of the WPA claim by the Superior Court after trial on stipulated facts, must also be affirmed, regardless of whether or not this court agrees with the decision of the Court of Appeals that the interest arbitration award did not fix a date for payment of the retroactive wage adjustments.

2. Here as in Champagne, the record lacks substantial evidence to support findings of "willfulness" or "intent to deprive" necessary for a viable WRA claim.

Here as in *Champagne*, the Employees do not allege that bad faith or animus motivated the delayed payment. Since the delay in payment of the retroactive wages arose solely from the time it took for the parties to agree on the exact contract language required by the interest arbitration award and from the administrative difficulty in determining the amount of retro wage payments due each individual employee, the retro payments were not willfully withheld. Trial Court Finding of Fact 1.7 at CP 594 and CP 141-142 (Declaration of Christine Gianini). Nor were the payments withheld with an intent to deprive the Employees of the retro wage payments they may be due. The wages were promptly paid after the individual payment amounts for the many employees were calculated. In addition, the retro wages were paid before the new collective bargaining agreement was in effect and before the City reasonably and in good faith believed them to be due. Trial Court Finding of Fact 1.10 at CP 394. *A bona fide dispute as to the obligation of payment clearly existed. A bona fide dispute is a "fairly debatable" dispute over whether . . . all or a portion of the wages must be paid. Champagne* at 81, citing *Shilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161-62, 961 P.2d 371 (1998) (citing *Cannon v. City of Moses Lake*, 35 Wn. App. 120, 125, 663 P.2d 865 (1983); *Moran v. Stowell*, 45 Wn. App. 70, 81, 724 P.2d 396 (1986);

Chelan County Deputy Sheriffs' Ass'n, 109 Wn.2d 282, 745 P.2d 1 (1987)). Accordingly, the record lacks the requisite substantial evidence that gives rise to a finding of willful withholding on the part of the [City].” *Champagne* at 82.

The administrative difficulty in hand computing each of the employees individual retro payment described in the Declaration of J. Christine Gianini (CP 141-142) is undisputed in any declaration submitted by the Employees to the trial court in opposition to the motion for summary judgment. “[W]here no dispute exists as to material facts, the court may dispose of such questions on summary judgment.” *Champagne* at 82.

The Employees had every opportunity to submit to the Trial Court affidavits or declarations raising a material factual issue on the issue of “willful conduct.” The Employees did not attempt to bring any such evidence before the trial court. Even the stipulated facts and trial exhibits (CR 383-563) upon which the WRA claim was decided by the trial court fail to demonstrate any willful conduct or intent to deprive the employees of the retro wage payments they would be due after the payments were calculated.

Without any support in the record, the Employees make the following statement in their Supplemental Brief at page 5-6: *Had the trial court not erred in dismissing the officers' claims under the WRA, the officers could have presented evidence of the City's willful conduct*

sufficient to support an award of double damages, and, they will do so if this case is remanded. The Employees had an obligation to raise material issues of fact in response to the City's Motion for Summary Judgment and supporting declarations. Under CR 56(e), *[W]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.* The summary judgment record is absent of any conduct committed by the City that would support the WRA elements of willfulness and intent to deprive. Thus, summary judgment dismissal was appropriately entered against the Employees.

Therefore, regardless of whether or not this court agrees with the decision of the Court of Appeals that the interest arbitration award did not fix a date for payment of the retroactive wage adjustments, the dismissal of the WRA claim made by the trial court on summary judgment must be affirmed.

3. The Court of Appeals correctly applied the statutory provisions of Chapter 41.56 RCW in holding that an interest arbitration award requiring contract language providing for a retroactive increase in wage rates is not the equivalent of a judgment and did not fix a date for payment of the retroactive wages that may be due the employees.

The Employees erroneously argue at page 6 of the Petitioners' Supplemental Brief that the Court of Appeals erred in holding that the Employees were not entitled to a remedy under the WRA because the Employees did not bring a separate action to enforce the arbitration award or bargain for and obtain language requiring the retroactive payments be paid by a specific date. Employees claim that this holding ignores the express language of RCW 41.56.450 and the legislative intent behind it. The Employees' argument ignores the clear statutory language. RCW 41.56.450 in pertinent part², states as follows:

The neutral chairman shall consult with the other members of the arbitration panel, and, within thirty days following the conclusion of the hearing, **the neutral chairman shall make written findings of fact and a written determination of the issues in dispute, based on the evidence presented.** A copy thereof shall be served on the commission, on each of the other members of the arbitration panel, and on each of the parties to the dispute. **That determination shall be final and binding upon both parties, subject to review by the superior court upon the application of either party solely upon the question of whether the decision of the panel was arbitrary or capricious.** (bold emphasis added)

² The complete text of RCW 41.56.450 is included in the Appendix.
(GAR700268.DOC;1/00020.050271/)

Although the determinations of the interest arbitrator are final and binding, the determinations of the interest arbitrator are limited to resolving contractual language issues that the parties were unable to agree upon by collective bargaining. *IAFF, Local 46 v. City of Everett, supra* at 46. In the interest arbitration award dated March 3, 2004, (Ex. 2 of CP 383-563), the arbitrator decided and awarded wage rate increases for the years 2002, 2003, and 2004. See Interest Arbitration Award - 35 (included in the Appendix hereto). The arbitrator was not asked to decide nor did not decide or include in her award a date for payment of the retro pay amounts that would result from the inclusion of contract language in a new collective bargaining agreement incorporating the wage rate increases specified in the award. Likewise, the arbitrator did not determine the amount of retro wage payment due any bargaining unit member that would benefit from the new contract language. The decision and award of the arbitrator includes no language directing the City to pay any employee any amount of money. To comply with the decision and award, the parties were required to ratify a new collective bargaining agreement, which agreement included language incorporating the decision and award.

A decision of the arbitration panel is final and binding on the parties and may be enforced at the instance of either party, the arbitration panel, or the commission in the superior court for the county where the dispute arose. RCW 41.56.480. There was no need for any enforcement action and none was taken because the City and Employees entered into a

new collective bargaining agreement, incorporating the decision and award of the interest arbitrator. Trial court Finding of Fact 1.10 at CP 394.

The Employees additionally argue at Petitioners' Supplemental Brief - 6, that the Court of Appeals decision allows an employer to delay the payment of wages awarded in an interest arbitration without the adversely impacted employees having any remedy under the WRA. This argument is without merit for two reasons. First, as argued above, the interest arbitration award does not award wages or order the payment of wages by an employer to its employees. The interest arbitration award settles disputes over language to include or not to include in a new collective bargaining agreement. Second, compliance with the decision and award is subject to enforcement by either party. RCW 41.56.480.

The decision by the Court of Appeals does nothing to discourage interest arbitration under Chapter 41.56 RCW. The argument of the Employees at the bottom of page 6 of the Petitioners' Supplemental Brief suggesting that the Court of Appeal's decision is inconsistent with Washington's "strong public policy . . . favoring arbitration of disputes" has no substance.

D. CONCLUSION

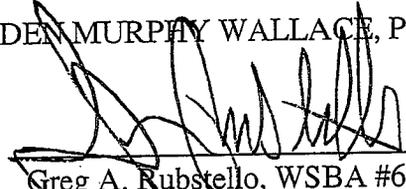
In consideration of the above arguments, the court should affirm the decision of the Court of Appeals for the reasons cited by the Court of

Appeals and/or for the reason that the record facts do not demonstrate the violation of the MWA, the WPA or the WRA.

RESPECTFULLY SUBMITTED this 16th day of July, 2008.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

By: 

Greg A. Rubstello, WSBA #6271
Attorney for Respondent,
City of Redmond

APPENDIX

PAGE 35 OF INTEREST ARBITRATION AWARD

Accordingly, the RPA's proposals are denied. The City's proposal to increase the entry level education premium is awarded.

VII. AWARD SUMMARY

The decision and award of the Arbitrator in this dispute is as follows:

A. Wages:

2002	Across-the-board increase of 3.51%
2003	Across-the-board increase of 1.5%. This amount is equal to 100% of the CPI-W, Seattle-Tacoma-Bremerton, as measured from June to June.
2004	Across-the-board increase of .9%. This amount is equal to 100% of the CPI-W, Seattle-Tacoma-Bremerton, as measured from June to June.

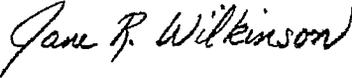
B. Contribution to Health Care Premiums

2003	10% employee contribution to dependant medical, vision, and dental premiums
2004	10% employee contribution to dependant medical, vision, and dental premiums

C. Longevity and Education Premium Pay

- There will be no change to longevity pay.
- The parties' 2001-2003 collective bargaining agreement will contain, for entry-level employees, a .75% premium for an AA degree and a 1.5% premium for a BA degree.

Date: March 3, 2004


Jane R. Wilkinson
Labor Arbitrator

TRIAL COURT FINDINGS OF FACT

1 1.4 Arbitrator Wilkinson issued her written determination and Award on March 3,
2 2004. ~~Revised~~ The Award included in part that the arbitrator's determination that the language
3 of the collective bargaining agreement provide that employee wage rates for contract years 2002,

4 2003, and 2004 be increased by specified percentages, *with specified changes retroactive*
5 *to January 1st of each year. Thus, all employees were due back pay by the*

6 1.5 After receiving the Arbitrator's Award on March 5, 2004, the parties collective *terms of*
7 bargaining representatives worked on completing a final draft of the 2002 - 2004 collective *the*
8 bargaining agreement. The final draft incorporated the tentative agreements reached in collective *award*
9 bargaining, the agreements reached going into interest arbitration, and the determinations of the
10 arbitrator. Contract language issues were resolved between the bargaining representatives on or

11 about April 2, 2004 a week following the March 25, 2006 pay day. *No party ever sought review*
12 *of the Award in Superior Court.*

13 1.6 On April 2, 2004, the RPA bargaining representative also inquired of the City
14 representative as to whether the collective bargaining agreement would be submitted to the City
15 Council for ratification on April 9, 2004, and asked *why payment of the retroactivity [pay] is*
16 *being delayed in light of RCW 41.56.450 which makes the Arbitrator's decision final and binding*
17 *on the parties.*

18 1.7 On April 9, 2004 the City bargaining representative responded that the contract is
19 on the agenda for council approval on May 4, 2004, and that retroactive pay due the employees
20 would not be paid until the May 25, 2004 paycheck due to the number of employees involved
21 and the time consuming manual calculations required for each employee. ~~No protest from the~~
22 ~~RPA or an employee appears in the record.~~

23 1.8 The retroactivity pay was paid as part of the May 25, 2004 payroll. ~~No protest by~~
24 ~~the RPA or any employee as to the amount paid appears in the record.~~

25 1.9 City pay days are regularly the 10th and 25th of each month. *5 intervening pay days*
26 *passed between the receipt of the Award and payment of wages.*

1.10 The 2002 - 2004 collective bargaining agreement was signed on June 7, 2004 by
the RPA President and on June 8, 2004 by the Mayor.

1.11 *There is no evidence in the record that the RPA obtained*

1 i a judgment based upon the arbitrator's award. Instead, it appears
2 that the RPA expected the arbitrator's award to be implemented sooner
3 than it was.

4 1.12 The employees first disclosed the actual amount of wages they claim to be owed
5 and unpaid, on May 15, 2006. Stipulated Fact #49.

6 Based upon the above findings, the court now makes the following conclusions of law:

7 II. Conclusions of Law.

8 2.1 The interest arbitration award did not create an immediate obligation to pay
9 money to the employees. *The obligation had to be created through entry of a*

10 2.2 WAC 296-126-023 does not mandate that the retroactivity pay be paid the
11 employees no later than March 25, 2004, retroactivity payments awarded by an interest arbitrator
12 are outside the scope of the regulation; *was due in Jun 2004, after the wages had been paid*

13 2.3 The retroactivity payments were not due and owing to the employees prior to the
14 May 25, 2004 pay day;

15 2.4 Interest did not accrue on the retroactivity pay between March 25, 2004 and May
16 25, 2004; *because no judgment had been entered and no collective bargaining agreement had yet been signed.*

17 2.5 The retroactivity pay provided for in the arbitration award does not fall within the
18 definition of wages in RCW 49.46.010 (2);

19 2.6 Any interest that accrued between March 25, 2004 and May 25, 2004 does not fall
20 within the definition of wages in RCW 49.46.010 (2);

21 2.7 RCW 49.48.030 does not create any entitlement by the employees to pre-
22 judgment interest or to attorney fees. *under these facts.*

23 ~~2.8 The equitable doctrine of laches should be applied to bar Plaintiffs claims under
24 RCW 49.48.030.~~

1 2.8. The defense of laches has not been proven.
2 The RPA objected to the timing of the payment of wages
3 (retroactive wages) under the Award in a timely manner. (P)

4 Dated July 10, 2006.

5
6
7 _____
8 Hon. Jim Rogers
9 King County Superior Court
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Findings and Conclusions - 4 (P)

Hon. Jim Rogers
King County Superior Court
Dept. 45
516 3rd Avenue
KCC-SC-0203
Seattle, Washington 98104

DECLARATION OF GIANINI

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

ALMQUIST, et al.,

Plaintiffs,

v.

CITY OF REDMOND, a political subdivision
of the state of Washington,

Defendant.

NO. 04-2-40865-2 SEA

DECLARATION OF J. CHRISTINE. GIANINI
IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

17 I, J. Christine Gianini, hereby declare:

18 1. I am competent to testify and make this declaration based on personal knowledge;

19 2. I am employed by the City of Redmond in the position of Accounting Manager.

20 3. City of Redmond payroll records show that all retroactive pay calculations required by
21 the March 3, 2004 Interest Arbitration Award were completed and included in the May 25, 2004
22 city payroll.

23 4. The retroactive pay calculations were completed manually and individually for each of
24 the 76 then current and former employees receiving retroactive pay. The calculation had to be
25 done manually to account for overtime pay, longevity , and other special pay that was received
26 by the employee during the years 2002, 2003 and 2004. Pay and hours had to be reviewed for
27 each pay period. This process was time consuming (up to four hours for each employee) and had
28 to be accommodated with the regular and on going work of the Payroll Department. There was
29 no deliberate delay by the Payroll Department in calculating and distributing the individual back

1 pay awards between the time of the Payroll Departments' receipt of the award and the payments
2 made in May 2004.

3
4 I hereby declare under penalty of perjury under the laws of the State of Washington, that the
5 foregoing declaration is true and correct.

6 Dated: July 22, 2005

J. Christine Gianini
J. Christine Gianini

7

DECLARATION OF SERVICE

I hereby declare that I sent a copy of the document on
which this declaration appears via fax/mail/messenger
service to J. Julius

I declare under penalty of perjury of the laws of the
State of Washington that the foregoing is true and correct.

Executed at Seattle, WA on 7-27-05

Signed by: [Signature]

RCW 41.56.480

RCW 41.56.480

Uniformed personnel — Refusal to submit to procedures — Invoking jurisdiction of superior court — Contempt.

If the representative of either or both the uniformed personnel and the public employer refuse to submit to the procedures set forth in RCW 41.56.440 and 41.56.450, the parties, or the commission on its own motion, may invoke the jurisdiction of the superior court for the county in which the labor dispute exists and such court shall have jurisdiction to issue an appropriate order. A failure to obey such order may be punished by the court as a contempt thereof. A decision of the arbitration panel shall be final and binding on the parties, and may be enforced at the instance of either party, the arbitration panel or the commission in the superior court for the county where the dispute arose.

[1975 1st ex.s. c 296 § 30; 1973 c 131 § 7.]

Notes:

Effective date -- 1975 1st ex.s. c 296: See RCW 41.58.901.

Construction -- Severability -- 1973 c 131: See RCW 41.56.905, 41.56.910.